BEFORE THE IOWA CIVIL RIGHTS COMMISSION

SHERRY WILLIAMS, Complainant,

VS.

HISKEY APARTMENTS and EUGENE HISKEY, Respondents.

CP# 06-83-10648

THIS MATTER a complaint filed by Sherry Williams (Complainant) with the Iowa Civil Rights Commission (Commission) charging Hiskey Apartments and Eugene Hiskey (Respondent) with discrimination in employment on the basis of sex came on for hearing in Des Moines, Iowa on the 25th day of August 1987, before Ione G. Shadduck serving as Hearing Officer. The hearing was continued on September 1, 1987 for the testimony of an additional witness. Complainant was represented by Rick Autry, Assistant Attorney General. Respondent was represented by Jeffrey A. Krausman, Attorney at Law.

After having reviewed the record, testimony, and exhibits the Hearing Officer makes the following findings of fact, conclusions of law, recommended decision and order.

FINDINGS OF FACT:

1. The Complainant, Sherry Williams, timely filed verified complaint CP# 06-83-10648 with the Iowa Civil Rights Commission on June 20, 1983, alleging a violation of Iowa Code section 601A.6, discrimination in employment on the basis of sex, by Hiskey Apartments and Eugene Hiskey, Respondents.

2. A true copy of the verified complaint was promptly served by certified mail upon Respondents on June 28, 1983.

3. The investigation was completed on August 27, 1986. The investigator recommended a finding of probable cause and on November 7, 1986, the Internal Hearing Officer determined probable cause existed to credit the allegation that Respondent discouraged and did not consider Complainant because of her sex and that the failure to hire Complainant was caused by sex discrimination.

4. On November 20, 1986, Respondent was notified of the probable cause determination, conciliation was attempted but failed and notice of hearing issued on April 7, 1987.

5. On Sunday, June 12, 1983, Respondent ran an advertisement in the classified section of the Des Moines Register which read as follows:

General Manager

> Needed by businessman for wide variety of responsibilities. Primary business is apartment ownership and management. Other interests include laundromats, car wash and vending. Applicant must be a mature, hard- working, honest (bondable), neat-appearing person. This is an office/supervisory position with excellent potential for right person. $14,000/yr. to start with advancement as position, responsibilities and knowledge of business increases. Must be able to meet the public and present a positive image. For Appt. call 274- 0434 Monday after 10:00 AM.

6. On Monday, June 13, 1987, at approximately 10:05 A.M., Complainant called the number given in the ad and tried to apply for the job. She testified that the woman who answered the phone told her: "I hate to say no to a woman, but Mr. Hiskey wants a man." (See Complainant's Exhibit 3).

7. Complainant shared the experience with her mother, Betty Williams, and called the Commission at 10:09 A.M. that same morning (See Complainant's Exhibit 4).

8. The Commission intake information process occurred on June 15, 1983 and on that same day, Complainant sent a certified letter of application with resume to the Hiskey Apartments. It was received by Respondent on June 17, 1983. There was no response to that letter.

9. Steinberg, the receptionist-secretary for Respondent during June 1983, testified that she answered the phone in response to the ad and scheduled the applicants for appointments with Hiskey. Usually two days were set for scheduled interviews and when the time slots were filled no more were scheduled. Steinberg and Donna Beers were the only two persons receiving the phone calls in response to the ad. Steinberg testified that she was not told by Hiskey that he did not want women applicants and that she did not discourage women applicants. She did not remember how many, if any, women she scheduled for appointments for this job.

10. Eugene Hiskey was the owner of Hiskey Apartments. He testified that he had hired women two prior times as general managers and that he did not instruct anyone that he did not want a woman for the job at issue.

11. Respondent did hire a male for the position at issue; one he interviewed on June 15 (See Respondent's Exhibit B). Hiskey testified that he was scheduled to interview 2 women; one he did interview and the other did not show. Sullivan, the male hired, could not begin work until July 1, but Hiskey said he hired him that next day (June 16) after he checked references.

12. Donna Beers, a prior employer, was hired just for the day of June 13, to help answer the phone calls since both Hiskey and his wife were to be gone. She was told that when the time slots were filled, to just take the name and number and explain that all appointments had been filled and if the position was not filled with the applicants who had appointments they would be called. Beers allegedly had distinctive slurring of her words due to a stroke which occurred in early 1981. None was noticeable at the hearing.

13. Hiskey testified that the applicants to be interviewed were selected by calling in, writing their name on the schedule sheet as to the time they were to come in until the schedule sheet was filled; i.e., the first one that called got the name down, then the second caller, etc. The secretaries were not asked to screen the calls.

14. Beers testified that Hiskey called her and said: "Donna, after working for me for two years, you are aware of what I need in this office, what the duties would be of a general manager," and "would you consider coming in, even part time or giving as many hours to help Sharon out with the phone?". She accepted and worked on June 13 starting about 10 o'clock. She used Hiskey's office. The door between the two offices, the one used by Beers and the one used by Steinberg, was closed. Steinberg divided the scheduling chart with one taking on-the-hour appointments and one the half hour appointments.

Beers denied that she told any callers that Hiskey wanted a man for the job. She also testified that she made appointments with women and she didn't remember refusing to book any appointments.

15. Beers said that she had discussed with Steinberg that the ad was misleading in that it did not indicate the amount of physical labor involved. Steinberg denied such a discussion. Beers admitted discouraging several "perceived older" women from scheduling interviews because of potential physical labor of the job (Transcript pages 102-103).

16. Complainant's relevant earnings were as follows:

1983	$5,214.00	($640 after date of incident) Unemployment compensation
	$1,192.53	Manpower, Inc.
	$1,083.76	State Comptroller
	$462.95	Kelly Services
	$62.32	4th Quarter State Contribution
Total	$3,441.56	(from June 20, 1983)
1984	$15,160.64	State of Iowa
	$868.76	Fringe Benefits
Total	$16,029.40	
1985	$4,144.14	State of Iowa
	$12,692.00	HOMZ
Total	$16,836.14	
1986	$18,321.60	HOMZ
	$97.00	Unemployment

Total	$18,418.60	
1987	$4,212.00	26 Weeks Unemployment
	$1,416.83	Manpower
Total	$5,628.83	(through 8-28-87)

17. Has Complainant been hired by Respondent, her starting salary would have been $14,000.00. Evidence as to pay increases was not provided. Hiskey testified that he did not provide insurance or retirement benefits.

18. Complainant had approximately four years of experience in rental management. Sullivan, the preferred applicant had no rental management experience.

CONCLUSIONS OF LAW

1. The complaint was timely filed, processed and the issues in the complaint are properly before the Hearing Officer and ultimately before the Commission.

2. Hiskey Apartments and Eugene Hiskey, are "employers" and "persons" as defined in Iowa Code section 601A.2(2) and (5)(1983), and are therefore subject to Iowa Code section 601A.6 and do not fall under any of the exceptions of section 601A.6(5).

3. The applicable statutory provision is as follows:

> 1. It shall be an unfair or discriminatory practice for any:
>
> > a. Person to refuse to hire, accept, register, classify, or refer for employment .... or to otherwise discriminate in employment against any applicant for employment... because of the ... sex ... of such applicant ... unless based upon the nature of the occupation...
> >
> > * * *
> >
> > c. Employer, employment agency, labor organization, or the employees, agents or members thereof to directly or indirectly advertise or in any other manner indicate or publicize that individuals of any particular ... sex, ... are unwelcome, objectionable, not acceptable, or not solicited for employment ... unless based on the nature of the occupation.

4. The Commission rules provide as follows:

> 240-3.2(601A) Sex as a bona fide occupational qualification. The bona fide occupational qualification exception as to sex is strictly and narrowly construed. Labels - "men's jobs" and "women's jobs" tend to deny employment opportunities unnecessarily to one sex or the other.

* * *

240-3.3(601A) Recruitment and advertising.

> 3.3(l) Employers engaged in recruiting activity must recruit employees of both sexes for all jobs unless sex is a bona Fide occupational qualification.

* * *

240-3.6(601A) Job policies and practices.

> 3.6(l) Written personnel policies relating to this subject area must expressly indicate that there shall be no discrimination against employees on account of sex...
>
> 3.6(2) Employees of both sexes shall have an equal opportunity to any available job that he or she is qualified to perform, unless sex is a bona fide occupational qualification.

* * *

5. Respondent does not claim that sex is a bona fide occupational qualification for the General Manager position. Respondent claims that female and male applicants were treated the same. The United States Supreme Court set out the basic allocation of burden and order of presentation of proof in a case alleging discriminatory treatment in McDonnell Douglas Corp. v. Green , 411 U.S. 792 (1973). In Texas Department of Community Affairs v. Burdine, 450 U.S. 248,256, 101 S.Ct. 1089, 1093, 67 L.Ed. 2d 207,215 (1981), the Court summarized that burden and order from McDonnell as follows:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving a prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Id. at 802. 5 FEP Cases, at 969. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Id. at-804, 5 FEP Cases at 907.

This basic allocation of burdens and order of presentation of proof was adopted by the Iowa Supreme Court in Linn Cooperative Oil Co. v. Quigley, 305 N.W.2d 729, 733 (Iowa 1981).

6. The complainant carries the initial burden of offering evidence adequate to create an inference that actions by a respondent were based on a discriminatory criterion which is illegal under the law. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358, 97 S.Ct. 1843 (1977). In evaluating the evidence to determine whether the complainant has succeeded in

establishing that inference, which is referred to as a *prima facie" case, the Commission and the Iowa Court have relied on McDonnell Douglas. The criteria established in McDonnell Douglas, however, were specific to a qualified applicant of a protected class who applied for a job and was rejected despite the qualification. Since then the Supreme Court has made it clear that the McDonnell Douglas criteria were to be neither "rigid, mechanized, or ritualistic. - Furnco Const. Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943 (1978). Courts have been flexible in adopting the criteria to other types of cases.

7. In the case at issue, a prima facie case of sex discrimination may be shown through analogy if Complainant can establish the following:

> a. that she is a member of a protected class;
> b. that she attempted to apply for a job which was available;
> c. that she was precluded from applying for that job;
> d. that after being denied the opportunity to apply, the position remained available to persons who were not in the same protected class.

Williams, a female, is a member of a protected class; she attempted to apply for a job which was available; she was precluded from applying for that job; and, after being denied the opportunity to apply the position remained available to persons who were not in the same protected class. A prima facie case of discrimination has, therefore, been established. To establish a prima facie case of failure to hire, the elements would be: membership in a protected class; application for a job for which she was qualified and for which the employer was seeking applicants; despite qualifications, she was rejected; and after rejection, the position remained open and the employer continued to seek applicants with similar qualifications.

The issue to be resolved in this situation is not the issue of Complainant's qualifications since she never reached the interview stage. It was established in Nanty v. Barrows, Co., 660 F.2d 1327,1332 (9th Cir. 1981), that proof of qualification under such circumstances is not required. The court stated:

> ... although Nanty was a legitimate candidate for a position the employer was seeking to fill, Barrows rejected him at a time when it had no knowledge of, and no way of evaluating, his qualifications. Therefore, neither "an absolute or relative lack of qualification"...was the reason for Nanty's rejection, and Nanty established his Prima facie case.

When an employer summarily rejects an applicant without considering the qualifications of that applicant, those qualifications are irrelevant to whether the complainant has raised a prima facie case of disparate treatment. See EEOC v. Ford Motor Co., 645 F.2d 183, 188 n.3, 198-199(4th Cir. 1981). In the case at issue, it is concluded that Williams has established a prima facie case of failure to hire based on the same reasoning. The evidence, in any case, does indicate Williams was qualified.

9. The burden of persuasion remains with the Complainant, however, a prima facie case creates a "presumption" of discrimination which, if believed will require a finding of discrimination.

Burdine, 450 U.S. 248**,** 101 S.Ct. 1089. If the employer desires to dispel this presumption, evidence must be produced showing "some legitimate, nondiscriminatory reason" for the challenged action. McDonnell Douglas, 411 U.S. at 803, 93 S.Ct. at 1824, 36 L. at 668. The employer need not Persuade the trier of fact that it was action motivated by the proffered reason.

> It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. [footnotes omitted]

Burdine, 450 U.S. at 254, 101 S.Ct. 1094.

10. Respondent denies a policy of not hiring women as general managers. He stated that he has, in fact had two women in that position. He stated further that he did not request his personnel who took the phone calls in response to the ad to preclude women from scheduling interviews. Hiskey's regular employee, Steinberg, denies refusing to schedule women for interviews but did not remember scheduling any for interviews. Hiskey's other employee, Beers, who helped out just for the day interviews were being scheduled stated that she did, in fact, schedule at least two women for interviews. Hiskey affirms that testimony, in that he did interview one woman and that one woman did not appear for her interview. Both deny having told Williams that a man was wanted for the position.

11. The Complainant retains the burden of persuasion. She can prevail in her ultimate burden of proof by showing that Respondent's articulated reasons are pretextual or unworthy of credence. Burdine, 101 S.Ct. at 1095, McDonnell-Douglas, 411 U.S. at 804.

12. Both Steinberg and Beers agreed on the procedure which was followed in answering calls in response to the ad. If someone called and expressed an interest in the job, their name was placed on the interview schedule. This was done as the calls came in until the interview slots were filled. Complainant's name was not on the interview schedule. She called in just a few minutes after 10:00 A.M., the time given in the ad as the first time to call. The ad did not identify Hiskey Apartments as the employer. Two things could have occurred: 1) Williams did not call, or 2) Williams called and the person answering the phone did not schedule her for an interview. Why would Williams say she called if she didn't call? She was out of a job. The ad described a job for winch she was interested and experienced. She could not have known the employer was Hiskey Apartments unless she called the number given in the ad. in her note written at 10:05 A.M. on June 13, 1983, she wrote "Hiskey Apt's" At 10:09 A.M., she called the Commission to set up an appointment for filing a complaint and on June 15, 1985, she provided the name and number of Hiskey Apartments to the Commission Intake Personnel.

The evidence is clear that there was an ad for a general manager in the June 12, 1983 Des Moines Register; that Eugene Hiskey placed that ad; that phone call applications were received starting at 10:00 A.M. on June 13; that interviews were set up for the 14th and 15th; that William called her mother immediately after the call to the number in the ad; that Williams proceeded then to file a complaint based on sex discrimination; and that she then submitted her resume with

a letter requesting an interview. None of this is disputed. The only dispute is whether or not Steinberg or Beers, acting in behalf of Respondent, precluded Williams from scheduling an interview. It is not reasonable that Williams would fabricate the phone call in order to file a complaint against someone whom she didn't even know. It is reasonable to believe from the testimony that Beers assumed a male was preferred or that a female, particularly an older female, would not be capable of doing the job.

It is concluded that Respondent, through his agent, intentionally denied Complainant the opportunity for an interview for the position of general manager because she is a female.

13. Iowa rule is that at common law the master and servant may each and both be liable for a servant's tort committed in the course of employment, with master ordinarily having the right of recourse against the agent in event the master is held liable for negligence of the agent. Graham v. Worthington, 146 N.W.2d 626, 259 Iowa 845 (1966); see also, Sandman v. Hagan, 154 N.W.2d 113, 261 Iowa 560 (1967); Wiedenfeld v. Chicago & N.W.Transp. Co., 252 N.W.2d 691 (1977). To impose liability on an alleged master of person committing a tort, control over such person should be of such character as to enable the master to direct the manner of performing the services and to prescribe what particular acts shall be done in order to accomplish the end intended. Crum v. Walker, 44 N.W.2d 701, 241 Iowa 1173 (1950). A significant factor in control as an element of employer-employee relationship is the power of one for whom services are rendered to terminate the relationship without cause or at short notice. The fact that services are rendered by part-time work does not rebut inference of permanency so long as the services rendered are reasonably and regularly recurrent. Tapager v. Birmingham 75 F.Supp. 375(1948). If the employee is acting on the scope of the employment, the employer will be held liable. Jones v. Blair, 387 N.W.2d 349 (1986). In the case at issue, the employer requested the employee to come in and assist the regular employee in answering the phone calls which were anticipated in response to the ad. She used his office and his phone. She scheduled appointments for Ins interviews and she was familiar with the office routine and procedures as a prior full time employee. Respondent had the right of control and the right to direct the means and manner of doing the work of the persons answering the phone on June 13, 1983. Hiskey may not have authorized his employees to screen women out, however, an employer may be held accountable for the acts of his employees acting within the scope of that employment even though the employer had no knowledge of the act or would have disapproved of the acts. 53 Am.Jur.2d Master and Servant, §435, at 453 (1970); see Herring Motor Co. v. Myerly, 207 Iowa 990, 992, 222 N.W.2d (1928). It is concluded that Beers and Steinberg were acting in the scope of their employment with Hiskey and that he should be held liable for any act of denying Williams the opportunity of interviewing for the position of general manager and the failure to hire Williams for that position.

REMEDIES

When an unfair or discriminatory practice is determined, Iowa Code section 601A. 15(8)(1983), requires an order that a Respondent cease and desist from the practice. Such an order should be made.

Iowa Code section 601A.15(8)(1983) further requires a respondent to take remedial action necessary to carry out the purposes of Chapter 601A. Respondent should be establish a written policy of nondiscrimination to be approved by the Commission and which should be posted in his office and made known to his employees. All future ads for employment should contain a statement of nondiscrimination.

Remedial action under Iowa Code Chapter 60 1 A attempts to "make whole" a victim of discrimination and permits an award of damages to restore the victim to the position she would have been in had the discriminatory act not occurred. See Foods, Inc. v Iowa Civil Rights Commission, 318 N.W.2d 162,171 (Iowa 1982).

Complainant is currently working for Manpower accepting temporary assignments. If there is an opening for a general manager or similar position with Respondent during the year 1988, Complainant shall be given first opportunity for that job. Should she refuse, further opportunity is not required. Complainant shall keep Respondent informed as to her address.

Respondent shall pay Sherry Williams back pay for 1983 in the amount of $3,558.00 ($14,000 / 12 = $1166.666 month for months July through December 1983, less earnings of $3,442.00) plus 10% interest per annum from the date of filing the complaint (6-20-83) until paid in full. In years 1984, 1985, and 1986, Williams earned more than evidence shows she would have earned had she been hired by Hiskey. She also voluntarily quit her job with the State of Iowa. Back pay would cease when she found comparable paying work with the State.

Evidence does not support an award of damages for emotional distress.

RECOMMENDED DECISION AND ORDER

HISKEY APARTMENTS and EUGENE HISKEY violated Iowa Code section 601A.6, in denying Sherry Williams the opportunity of applying for and the failure to hire her for the position of general manager based on her sex.

1. IT IS ORDERED that Respondent cease and desist from unfair and discriminatory employment practices.

2. IT IS ORDERED that Respondent submit within 30 days of the final order in this case, a written policy of nondiscrimination for approval by the Commission. Upon approval, the written policy shall be posted in Respondent's office(s) and made known to all his employees; and further, all future ads for employment shall include a statement of nondiscrimination.

3. IT IS FURTHER ORDERED that in the event that an opening occurs during 1988 for a general manager or similar positions, Sherry Williams shall be given first opportunity for that job. Should she refuse, further opportunity shall not be required. Williams shall keep Hiskey informed as to her address.

4. IT IS FURTHER ORDERED that Respondent shall pay to Sherry Williams for back pay the amount of $3,558.00 plus 10% interest, per annum accruing from June 20, 1983 until paid in full.

Signed this 22nd day of December, 1987.

IONE G. SHADDUCK
Hearing Officer

FINAL DECISION and ORDER

The Iowa Civil Rights Commission has received and reviewed the Hearing Officer's Proposed Findings of Fact, Conclusions of Law, Recommended Decision and order dated December 22, 1987.

On February 26, 1988, the Iowa Civil Rights Commission, at its regular meeting, adopted the Hearing Officer's proposed decision as its own Findings of Fact, Conclusions of Law, Decision and order.

Signed this 10th day of March, 1988.

JOHN STOKES, Chairperson